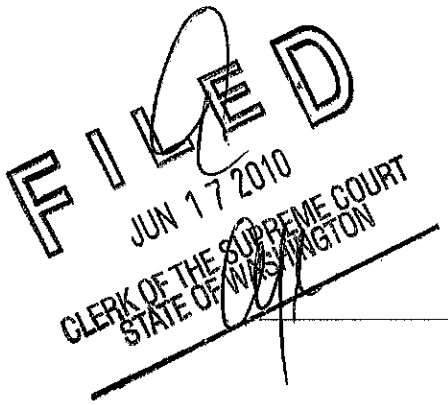
84686-3

No. _____

SUPREME COURT OF THE STATE OF WASHINGTON




No. 64151-4-I

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

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OLGA MATSYUK,
individually, and on behalf of all those similarly situated,

Petitioner,

v.

STATE FARM FIRE & CASUALTY COMPANY,

Respondent.

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**OLGA MATSYUK'S**
**PETITION FOR REVIEW**

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ORIGINAL

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## I. IDENTITY OF PETITIONER

Petitioner is Olga Matsyuk, Appellant in the Court of Appeals and plaintiff and proposed class action representative in the Superior Court.

## II. CITATION TO COURT OF APPEALS DECISION

Matsyuk requests that this Court grant review of the published opinion filed on March 29, 2010, by the Court of Appeals, Division One, captioned *Matsyuk v. State Farm Fire & Casualty Company*, No. 64151-4-I, ___ Wn. App. ___ (2010) (Appelwick, J.). *See* Appendix A. Matsyuk filed a motion for reconsideration, which was denied on May 5, 2010.

## III. INTRODUCTION

This case marks the next and necessary step in this Court's line of jurisprudence concerning the obligations of an insurer to bear its fair share of the legal expense its insured incurs when the insurer benefits from a monetary recovery its insured effects from the responsible tortfeasor.

Olga Matsyuk was injured when the car she was riding in was involved in an accident. The State Farm insurance policy covering the vehicle included PIP coverage. Consequently, as a passenger in the car, Matsyuk was a State Farm insured for purposes of the PIP coverage, and was thereby entitled to all the rights and benefits of the State Farm PIP insurance coverage. Likewise, State Farm, for purposes of the PIP, was directly obligated to Matsyuk as her PIP insurer, and in fact paid

Matsyuk's medical bills under the PIP coverage.

It happened to be that the driver of the car Matsyuk was riding in, Omelyan Stremditskyy, was the at-fault party. As a result, Matsyuk later sought to make a recovery from him. Her attorney negotiated a settlement of Matsyuk's claim against Stremditskyy. State Farm, as Stremditskyy's liability insurer under the same policy that had provided the PIP coverage to Matsyuk, was to make the liability payment on Stremditskyy's behalf. When it made payment to Matsyuk for the settlement of the liability claim against Stremditskyy, State Farm first deducted the payments it had already made to Matsyuk as her PIP insurer.

Matsyuk asserts that in order for State Farm to recoup its PIP payments from her liability recovery, State Farm must bear its share of the legal expense she incurred to make that liability recovery. Her position is based on this Court's line of precedent from *Mahler*, *Winters* and *Hamm*. This case concerns whether the reasoning and public policy concerns expressed in those cases apply equally to the facts here, or whether this case represents a line of demarcation from that line of precedent.

This case merits review under RAP 13.4(b)(1) because the decision of the Court of Appeals is in conflict with the aforementioned decisions of this Court. This case also merits review under RAP 13.4(b)(4) because it presents an issue of substantial public interest that should be determined

by this Court. Finally, there is another case pending at the Court of Appeals that involves a substantially similar question, but in Division Two: *Weismann v. Safeco Insurance Company of Illinois* (Ct. App. No. 39323-9-II). *Weismann* was argued on April 1, 2010, but an opinion has not yet been issued. In contrast to this case, the plaintiff in *Weismann* prevailed in the trial court. Because of the substantial possibility of a ruling in *Weismann* that diverges from Division One's ruling in *Matsyuk*, if this Court is not otherwise inclined to grant review it should consider holding its decision until Division Two issues an opinion in *Weismann*, in the event that review is then also proper under RAP 13.4(b)(2).

## IV. ISSUES PRESENTED FOR REVIEW

**A.** Did the Court of Appeals err when it held that State Farm, in its capacity as PIP insurer, was not obligated, under either a common law or contract basis, to pay a share of the legal expense its PIP insured (Matsyuk) incurred to make the liability recovery from the tortfeasor (Stremditskyy), and from which State Farm offset its PIP payments, on the basis that Matsyuk had not purchased the insurance policy?

**B.** Is the Court of Appeals opinion contrary to the legal expense sharing precedent established by *Mahler v. Szucs*, *Winters v. State Farm Mutual Automobile Insurance Company*, and *Hamm v. State Farm Mutual Automobile Insurance Company*, and *Hamm's* instruction that an

insurer that provides multiple coverages in connection with a loss must have the rights and responsibilities of each of its roles considered and analyzed separately?

**C.** Did the Court of Appeals err in holding that the Court of Appeals' 2001 opinion in *Young v. Teti* was not overruled by the Supreme Court's 2004 opinion in *Hamm v. State Farm Mutual Automobile Insurance Company*?

## V. STATEMENT OF THE CASE

Olga Matsyuk was a passenger in a vehicle driven by Omelyan Stremditskyy. CP 4. They were involved in an accident, for which Stremditskyy was responsible. CP 4. Matsyuk was injured in the accident, and sought and received medical treatment. CP 4.

State Farm provided insurance coverage applicable to the accident under a policy issued to Stremditskyy (the "Policy"). CP 4. Under the Policy, Matsyuk was a State Farm "insured" for purposes of the Policy's Personal Injury Protection ("PIP") coverage. CP 4. Thus, State Farm, in its capacity as Matsyuk's PIP insurer, paid her medical bills under the PIP coverage. CP 4.

Matsyuk then sought to recover against Stremditskyy as the party responsible for the accident and her injuries. CP 4. She reached a settlement of her liability claim against him for $5,874, which was to be

paid on Stremditskyy's behalf by State Farm in its capacity as his liability insurer. CP 4. State Farm indicated, however, that it would recoup its previous PIP payments from Matsyuk through an offset to the liability payment it was making on Stremditskyy's behalf, and thus provided a check for the difference only. CP 4.

Because State Farm was recouping its PIP payments from the liability funds Matsyuk recovered from Stremditskyy, Matsyuk asserted that State Farm was obligated to bear its fair share of the legal expenses she incurred to obtain those funds. CP 5. State Farm disagreed, asserting that it could offset the full amount of the PIP benefits paid, without any regard to or reduction for its share of the legal expense Matsyuk incurred in obtaining the liability recovery. CP 5. State Farm also initially refused to effectuate the agreed settlement of the liability claim against Stremditskyy unless Matsyuk also released wholly separate claims she might have against State Farm as its PIP insured. CP 5.

Hence, Matsyuk filed suit. The Complaint asserted claims for violation of the CPA, Bad Faith, Conversion and Breach of Contract. CP 8-10. The claims were based on statutory insurance law and regulations, common law, and on the language of the State Farm insurance policy. Because it appeared that State Farm's refusal to pay a share of legal expense in these circumstances is a uniform policy, the Complaint sought

relief for similarly situated State Farm PIP insureds. CP 5-8.

As to State Farm's right to seek recovery from its insureds, such as Matsyuk, of insurance payments it has made, the Policy provided:

> (1) If ***we*** are obligated under this policy to make payment to or for a ***person*** who has a legal right to collect from another party, then ***we*** will be subrogated to that right to the extent of ***our*** payment.
> ...
>
> ***Our*** right to recover ***our*** payments applies only after the ***insured*** has been fully compensated for the ***bodily injury***, ***property damage***, or ***loss***.

CP 122 (Policy, General Terms Section, at 42) (emphasis in original).

In the Superior Court, State Farm filed a motion to dismiss and Matsyuk filed a cross-motion seeking partial summary judgment. The trial court denied Matsyuk's motion and granted State Farm's motion, dismissing the case. Matsyuk appealed.

In its published opinion, Division One of the Court of Appeals affirmed the judgment of the trial court. Failing to appreciate that State Farm was acting in the capacity of two different insurers – as PIP insurer for Matsyuk and as liability insurer for Stremditskyy – the Court found *Mahler* and its progeny inapplicable because the PIP and liability funds all came from State Farm. *See* Slip Op. at 1, 5-8. The Court also held that there was nothing in its 2001 *Young v. Teti* opinion that was inconsistent with this Court's 2004 opinion in *Hamm*. *See* Slip Op. at 6-7. In addition,

the Court found *Hamm's* proscription against using a "non-duplication of benefits" clause to avoid legal expense sharing was inapplicable. *See* Slip Op. at 7 & n.7. The Court also ruled that because no *Mahler* fees were due, State Farm's use of the liability settlement as leverage to get Matsyuk to release claims she had against it as a PIP insured were nonetheless not actionable.

## VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

### A. The Opinion Is Contrary to the Principles of Law and Public Policy of *Mahler, Winters* and *Hamm*

The Supreme Court has addressed the legal expense sharing issue in a well known line of cases over the last twelve years. Each case has rejected requests to limit the applicability of the legal expense sharing rule. Each case has also had as a touchstone the established public policy of full compensation for insureds when possible.[1] None of these cases, however, support the proposition that there are two different classes of insureds: a superior class of those who are specifically named on the policy; and an inferior class of those who, while defined as insureds by the policy, are not specifically named on it (what State Farm has previously referred to as mere "serendipitous" insureds).

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[1] The cases often reference back to *Thiringer v. American Motors Ins. Co.*, 91 Wn.2d 215, 219-220, 588 P.2d 191 (1978), which set out Washington's public policy that an insured's right to receive full compensation is superior to an insurer's right to seek recovery of its payments.

In *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998), the Court first articulated the requirement that an insurer bear part of its insured's legal expense when the insurer recoups its payments out of liability funds recovered by its insured. In that case, the tortfeasor's liability insurer and the Mahler's PIP insurer were different companies.[2] When Mahler collected the liability insurance proceeds, her PIP insurer wanted to be reimbursed for its PIP payments. The issue was whether the PIP insurer, as a condition to recouping its PIP payments from its PIP insured, was obligated to bear a portion of the legal expense she incurred to make the recovery from the tortfeasor. As the Court identified it, "whether, and to what extent, State Farm must share with its insureds any expenses necessary to obtain a settlement from a tortfeasor." *Id.* at 421.

The Court held that the PIP insurer was indeed obligated to bear its share of the PIP insured's legal expense, based on the "common fund" doctrine. *See id.* at 426-27 ("This equitable sharing rule is based on the common fund doctrine, which ... applies to cases where litigants preserve or create a common fund for the benefit of others as well as themselves.") (citation omitted).

In *Mahler*, the funds comprising the PIP insured's liability

[2] The *Mahler* opinion actually addresses two separate appeals, with both cases involving the same PIP insurer.

recovery all came from the tortfeasor's liability insurer. *Id.* at 407, 436. In *Winters v. State Farm Mutual Automobile Insurance Company*, 144 Wn.2d 869, 31 P.3d 1164 (2001), the PIP insured's liability recovery came from two sources: part from the tortfeasor's liability insurer, and part from UIM coverage under same policy that had provided the PIP benefits.[3]

After being injured in an accident and receiving PIP benefits, Winters also pursued a claim against the tortfeasor. She recovered the liability insurance limits from the tortfeasor's insurer, but believing that she had not been fully compensated for her loss, Winters also sought to recover under UIM coverage. *Id.* at 873. Stepping into the shoes of the tortfeasor, the UIM insurer was ultimately required to pay additional damages to Winters. *Id.*

The parties agreed that the UIM insurer could recoup the PIP payments it had already made to Winters, and also agreed that this could be accomplished by offset to the UIM payment. Notwithstanding *Mahler*, however, the insurer asserted it could take the offset without regard for its share of the legal expense Winters incurred to secure the total liability recovery. *Id.* at 873.

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[3] *Winters* also involved two cases addressed in a single opinion.

Although the insurer providing a liability payment under UIM coverage was the same insurer (under the same policy) that had provided the PIP payments, in the correct analysis it made no difference. The Court recognized that a single insurer might be acting in more than one capacity in a matter, and that appreciating the particular capacity in which an insurer is acting is crucial to a proper analysis. *See id.* at 875 (identifying the issue as "whether a *PIP insurer* must pay a pro rata share of its [PIP] insured's attorney fees associated with recovering full compensation from an UIM insurer") (emphasis added).

That the PIP insured's liability recovery consisted of proceeds not just from the tortfeasor, but also proceeds from the PIP insured's own UIM carrier (who stepped into the shoes of the tortfeasor) was not determinative. Rather, what was important was that there was a pool of funds from which the insurer, *in its capacity as PIP insurer*, could recoup its PIP payments. *See id.* at 882 (the funds "became the common fund from which the *PIP insurer* was able to recoup [the PIP] payments it had made") (emphasis added).

The *Winters* opinion highlights several important public policy considerations that inform the decision. For example, it notes that an insured's right to full compensation is superior to an insurer's right to recoup its payments. *Id.* at 882, 883. It also notes that the result promotes

uniformity in result regardless of whether the coverages at issue are provided by one insurer or by two or more. *Id.* at 881. Finally, it notes that it promotes uniformity of result as to insureds, again regardless of whether the coverages at issue are provided by one insurer or by two or more. *Id.* ("[t]he fact that the same insurer provides both UIM coverage and ... PIP coverage should not result in the insured's bearing a greater amount of legal expenses").

Three years later, the decision in *Hamm v. State Farm Mutual Automobile Insurance Company*, 151 Wn.2d 303, 88 P.3d 395 (2004) addressed another factual variation on the legal expense sharing doctrine that an insurer contended mandated a different result. In that case, *all of the funds comprising the liability recovery* came from the same insurer (under the same policy) that had provided the PIP benefits.

After being injured in an automobile accident, Hamm sought and received PIP benefits. *Id.* at 306. Hamm also pursued a claim under the policy's UIM coverage, as the at-fault party was apparently uninsured. *Id.* After the amount of Hamm's loss was determined in an arbitration proceeding, her UIM insurer tendered a check that reflected an offset to the liability recovery for the full amount of PIP payments already made. *Id.* at 306-07.

This Court identified the issue presented as:

> Does the pro rata sharing rule for legal expenses articulated in *Mahler* (recovery from a fully insured tortfeasor) and in *Winters* (combined recovery from an underinsured tortfeasor and a UIM carrier) apply when the tortfeasor is uninsured and the insured recovers only from a UIM carrier?

*Id.* (Emphasis in original.) The Court concluded that it did. It made no difference that the same insurer provided both the PIP funds and the liability (under UIM) funds, or that both of the coverages were under the same insurance policy. If an insurer is to recoup its PIP payments from an insured's liability recovery, then the insurer is obligated to pay its share of the legal expense incurred to make that recovery. *See id.* at 321 ("In order to take the PIP offset, State Farm must pay its pro rata share of the legal expenses Hamm incurred in order to obtain the UIM recovery.").

*Hamm* is important in several respects, not the least of which is its reaffirmation of the principle that it is crucial to any proper analysis to consider the separate capacities in which a single insurer might be acting in any one instance. *See, e.g., id.* at 317 ("As in *Winters*, the issue presented ... does not depend on State Farm's role as UIM carrier but rather on 'whether or not [State Farm as] the PIP carrier should pay a pro rata share of legal expenses for its insured in recovering [its] PIP benefits from [liability payments funded by the same company as] UIM insurer.'") (quoting *Winters*, 144 Wn.2d at 882).

*Hamm* (echoing *Winters*) also expressed concern that a PIP insured not be worse off simply because a single insurer provided two applicable coverages, as compared to how she would fare if two different insurers provided the coverages. 151 Wn.2d at 312. Likewise, *Hamm* again expressed concern that a single insurer not unfairly benefit from providing two applicable coverages for an incident, as compared to two different insurers providing the same applicable coverages. *See id.* at 314-15.

The Court of Appeals' opinion in this case, however, is in conflict with the principles of law and public policy expressed in the foregoing line of cases. For example, the opinion fails to consider the rights and obligations of State Farm in the different capacities in which it acted in the underlying loss. The opinion only performs an analysis of State Farm's rights and obligations in its capacity as Stremditskyy's liability insurer. There is no meaningful evaluation of the rights and obligations of State Farm in its capacity as Matsyuk's PIP insurer.

This error is as critical as it is fundamental, as those rights and obligations are entirely separate from State Farms' rights and obligations as Stremditskyy's liability insurer. The undisputed fact is that Matsyuk was a State Farm insured under PIP. State Farm made PIP payments for Matsyuk solely because it was her PIP insurer, and was obligated directly to her as a covered insured. Thus, whether State Farm benefited from

Matsyuk's liability recovery in its capacity as Stremditskyy's liability insurer is not the issue. The issue is whether it benefited in its capacity as her PIP insurer recouping its PIP payments from her liability recovery. According to *Hamm* and *Winters*, that both payments came from State Farm is beside the point.

The Court of Appeals opinion also conflicts with the principle stated in *Hamm* and *Winters* that the result in any particular instance should be the same whether the applicable coverages are supplied by one insurer or by two or more. And that means the same result from the perspective of the injured insured, as well as from the perspective of the one or more insurers providing the applicable coverages. For example, if two separate insurers provided the applicable coverages here, Matsyuk would obviously be entitled to have the PIP insurer pay its share of her legal expense (essentially the facts of *Mahler*). But by denying Matsyuk the benefit of legal expense sharing simply because State Farm happens to provide both coverages makes her worse off. Likewise, if the liability coverage was provided by a different insurer, State Farm would plainly have to pay *Mahler* fees to recoup its PIP. But the Court of Appeals' opinion results in State Farm being better off because it provided both coverages. Such results conflict with *Hamm* and *Winters*.

### B. The Court of Appeals' Reliance on *Young v. Teti* Cannot Be Reconciled With the Analysis in *Hamm*, or the Facts of *Winters*

Partly relying on *Young v. Teti*, 104 Wn. App. 721, 16 P.3d 1275 (2001), the Court of Appeals found no conflict between it and the later decided *Hamm*, essentially opining that *Young* is still good law. But the rationale and reasoning in *Young* cannot be squared with the rationale and reasoning in *Hamm*, and the Court should accept review to address it.

Teti caused an automobile accident that injured Young, his passenger. Young received PIP benefits from the PIP insurer, who was also the liability insurer for Teti. *See* 104 Wn. App. at 723. Young pursued a claim against Teti and received a jury award, and Teti sought an offset in the amount of PIP payments. Young agreed to the offset, but sought *Mahler* legal expense sharing. *Id.* Although the trial court agreed with Young, the Court of Appeals did not, and reversed.[4]

The problem with relying on *Young* as good law, however, is that its reasoning is inapposite to the law and principles laid out in the after-decided *Hamm*. For example, the *Young* Court believed that *Mahler* did not apply because the liability recovery by Young against Teti did not "benefit" the insurer providing the two coverages, Allstate:

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[4] It's interesting to Note that *Young* is a Division Two opinion, where *Weismann* is currently pending and where the PIP insured prevailed in the trial court.

> Because Young's litigation [against Teti] did not benefit Allstate, *Mahler* does not apply; and Allstate need not share in Young's litigation costs. ... Unlike in *Mahler*, Young's lawsuit produced no additional party to reimburse Allstate.

*Id.* at 725-26 (emphasis added). The Court plainly failed to appreciate that Allstate acted in two different capacities (*i.e.*, liability insurer for Teti and PIP insurer for Young). The Court repeated the error with the following:

> [W]hen Young ... recovered [from Teti], she did not create a fund to benefit, or to reimburse, anyone other than herself. Young's jury verdict increased Teti's, and his insurer's financial obligation to Young [for] more than the [amount] Allstate had already paid her ... under ... PIP coverage.

*See id.* at 725 (footnote omitted).

In sum, the Court of Appeals believed that since Allstate had paid the PIP, and Allstate was also paying the liability judgment against Teti, those liability recovery funds could not be considered to benefit Allstate because all of the money was from Allstate. This line of reasoning is impossible to reconcile with *Hamm*. Indeed, in *Hamm*, this Court was explicit in detailing the error of such an analysis and why it is erroneous:

> [T]he Court of Appeals conclude[d] that "Hamm's *UIM* carrier received no benefit." ... (emphasis added). Focusing on State Farm's capacity as UIM carrier, the Court of Appeals decided that Hamm is not entitled to reimbursement from her UIM carrier for the legal expenses she incurred to create the UIM arbitration award. *Id.* at 778. In doing so, the Court of Appeals applied the rule for UIM carrier setoffs from *Dayton* rather than the rule for PIP carrier offsets from *Mahler* and *Winters*.

> The Court of Appeals' conclusions with respect to State Farm's obligations in its capacity as UIM carrier may be correct. As in *Winters*, however, "[t]he question presented here is totally different: whether or not the PIP carrier should pay a pro rata share of legal expenses for its insured in recovering PIP benefits from an UIM insurer." *Winters*, 144 Wn.2d at 882. ...
>
> The offset at issue in this case, just as in *Winters*, is a benefit to the PIP carrier, not the UIM carrier.

*Hamm*, 151 Wn.2d at 312-13 (underlining added).

*Young* cannot be reconciled with *Winters* either. As noted above, the *Winters* opinion addresses two appeals, one involving Winters and the other involving a plaintiff named Perkins. In contrast to Winters, the policy that provided Perkins with the PIP benefits was not "his" policy:

> Kyle Perkins was injured in an automobile accident while driving a vehicle owned by *Glenn Smith*. Like Winters, *Glenn Smith purchased* a State Farm automobile policy and paid for separate Liability, UIM and PIP coverages. Smith's policy *covered Perkins*, who was not at-fault in the accident. Because of his injuries, State Farm paid Perkins $18,480 in PIP benefits.

*Id.* at 874. That it was not Perkins' own policy, however, made no difference to the result:

> Winters and Perkins ... create[d] a common fund for the benefit of their PIP carrier. Neither Winters nor Perkins would be fully compensated if forced to bear the entire litigation costs of the common fund. ... [A]s between the insured and the insurer, we balance their interests and decide that the insurer should pay its share of the costs associated with recovery.

*Id.* at 883. This conflicts with the belief in *Young* and the Court of Appeals here that simply because it was not Matsyuk's own policy at issue mandated a different result.

### C. The Court of Appeals' Opinion Conflicts With the Law of Bad Faith

State Farm held up completing and funding the settlement of the liability claim against Stremditskyy in an effort to extract a release from Matsyuk's of her independent claims against State Farm. *See* CP 5, 8. Based on this conduct, Matsyuk asserted claims for, inter alia, bad faith. The Court of Appeals rejected the argument because it held State Farm was not obligated to pay *Mahler* fees on its recovery of its PIP payments. *See* Slip Op. at 13-14.

The Court of Appeals' opinion misses the point, and in doing so misstates and conflicts with the law on bad faith. The basis of the specific bad faith claim at issue was not State Farm's failure to pay *Mahler* fees. It was based on State Farm improperly leveraging its position as holder of the liability funds to try to extract a release from *its PIP insured* for claims the insured may have against State Farm that were unrelated to the liability settlement it effected on behalf of the tortfeasor. The (Matsyuk asserts incorrect) conclusion by the Court of Appeals that no *Mahler* fees were ultimately due does not mean State Farm did not act in derogation of the

duty of good faith it owed to Matsyuk as its PIP insured when it held up the liability payment. It is no different than the line of cases that stand for the proposition that an insurer can commit bad faith even when it is ultimately determined no coverage exists, and for that reason the Court of Appeals opinion is in conflict with them. *E.g., Coventry Assocs. v. American States Ins. Co.*, 136 Wn.2d 269, 279, 961 P.2d 933 (1998).

### D. The Court of Appeals' Opinion Relies on an Inapplicable Non-Duplication of Benefits Clause

In its opinion, the Court of Appeals relies on a "non-duplication of benefits" clause. *See* Slip Op. at 7 & n.7. This results in two significant errors. The first is that the clause cited applies only to liability coverage, and by its terms simply has no applicability to Matsyuk.[5] *See* CP 87 (Policy at 7). The Court of Appeals' erroneous application of the clause to matters outside its scope is a matter of serious concern and importance, and contrary to longstanding notions of insurance policy interpretation. The second is that employing the clause to permit State Farm to avoid legal expense sharing is contrary to *Hamm's* express proscription against

[5] It concerns only what liability payments State Farm will make on Stremditskyy's behalf, and has no application to the rights and obligations between State Farm as PIP insurer and Matsyuk as PIP insured An altogether different nonduplication of benefits clause pertains to that relationship. The wording of that nonduplication clause, however, merely provides that State Farm will not pay PIP benefits to the PIP insured if the PIP insured has *already received payments for the same damages under the liability coverage*. CP 93 (Policy at 13). The facts of record establish that this did not occur.

such a use. *See Hamm*, 151 Wn.2d at 311 n.4.

## VII. CONCLUSION

Under previously-expressed public policy, Ms. Matsyuk should not be worse off simply because State Farm provided two different coverages at issue in the same accident. Similarly, State Farm should not be better off than would be two different insurers that had provided the two coverages. Ignoring these principles and the precedent that established them, the Court of Appeals erred when it held that PIP insurer State Farm had no obligation, under either the common law or the insurance contract, to bear its share of the legal expense its PIP insured incurred to make a liability recovery from the tortfeasor. The error was compounded by the Court's reliance on *Young v. Teti* as good law, notwithstanding that *Young's* reasoning cannot be reconciled with *Hamm* or *Winters*.

This Court should grant review because the decision of the Court of Appeals is in conflict with *Mahler*, *Winters* and, in particular, *Hamm*, and also because it presents widely applicable insurance law issues of substantial public interest that should be determined by this Court. Depending on the opinion Division Two issues in *Weismann*, it may also merit review to the extent that the two decisions are in conflict.

June 4, 2010.

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DECLARATION OF SERVICE

I certify that on June 4, 2010, I caused to be filed with the Court of Appeals, Division I, via messenger, the foregoing Olga Matsyuk's Petition for Review, and caused to be delivered, via messenger, a true and accurate copy to:

Kenneth E. Payson
Hozaifa Y. Cassubhai
Davis Wright Tremaine LLP
Suite 2200 – 1201 Third Avenue
Seattle, WA 98101-3045

*Attorneys for Respondent*
*State Farm Fire & Cas. Co.*

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed in Seattle, Washington, this 4th day of June, 2010.

Matthew J. Ide

# APPENDIX A

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | | |
|---|---|---|
| OLGA MATSYUK, individually, and on behalf of all those similarly situated, | ) | No. 64151-4-I |
| Appellant, | ) | DIVISION ONE |
| v. | ) | PUBLISHED OPINION |
| STATE FARM FIRE & CASUALTY CO., | ) | |
| Respondent. | ) | FILED: March 29, 2010 |

Appelwick, J. — Matsyuk was injured while riding as a passenger in a car. She recovered from the at-fault driver's insurance company, State Farm, under both the personal injury protection and liability coverages. Matsyuk then sought a pro rata share of her attorney fees from State Farm. Because Matsyuk's recovery of both liability and personal injury protection payments came from the tortfeasor's insurer, no common fund was created and fee sharing is not appropriate. The trial court properly granted State Farm's CR 12(b)(6) motion to dismiss her claims for attorney fees, breach of contract, conversion, bad faith, and Consumer Protection Act, chapter 19.86 RCW, violation and denied her motion for partial summary judgment on the attorney fees issue. We affirm.

## FACTS

Olga Matsyuk and Omelyan Stremditskyy were in a car accident. Stremditskyy, the driver, was at fault and Matsyuk, the passenger, was injured. State Farm Fire & Casualty Company insured Stremditskyy's vehicle, including liability coverage and personal injury protection (PIP).[1] PIP coverage was available to Matsyuk as an occupant in Stremditskyy's vehicle, making her an additional insured even though she was not named in the policy. State Farm paid Matsyuk $1,874 under the PIP coverage.

Matsyuk then sued Stremditskyy for personal injury. Matsyuk and State Farm reached a settlement including a release of claims against Stremditskyy. The release stated,

> For the sole consideration of Five Thousand Eight Hundred Seventy-Four and No/100th Dollars ($5,874.00) (Four Thousand and No/100th dollars ($4,000) in addition to payments made/to be made under the Personal Injury Protection coverage in the amount of One Thousand Eight Hundred Seventy-Four and No/100th Dollars ($1,874.00)), the receipt and sufficiency whereof is hereby acknowledged, OLGA MATSYUK, the undersigned, hereby releases and forever discharges OMELYAN STREMDITSKYY . . . .

State Farm then gave Matsyuk a check for $4,000. State Farm stated that it would not pay a pro rata share of Matsyuk's legal expenses incurred in obtaining the liability recovery.

Matsyuk then brought this lawsuit against State Farm for failing to share in her legal expenses, claiming bad faith, conversion, breach of contract, and

[1] PIP coverage generally provides benefits for the immediate costs of an automobile accident, including medical expenses and loss of income. Hamm v. State Farm Mut. Auto. Ins. Co., 151 Wn.2d 303, 308, 88 P.3d 395 (2004).

Consumer Protection Act (CPA) violations. State Farm moved under CR 12(b)(6) to dismiss Matsyuk's complaint for failure to state a claim on which relief can be granted. Matsyuk moved for partial summary judgment on whether State Farm was required to pay a share of her legal expenses incurred in obtaining the liability recovery. The trial court granted State Farm's CR 12(b)(6) motion and denied Matsyuk's motion for partial summary judgment. Matsyuk timely appeals.

DISCUSSION

I. Standard of Review

Whether dismissal was appropriate under CR 12(b)(6) is a question of law that the court reviews de novo. San Juan County v. No New Gas Tax, 160 Wn.2d 141, 164, 157 P.3d 831 (2007). Under CR 12(b)(6), dismissal is appropriate only when it appears beyond doubt that the claimant can prove no set of facts, consistent with the complaint, which would justify recovery. Id. Such motions should be granted sparingly and with care, and only in the unusual case in which the plaintiff's allegations show on the face of the complaint an insuperable bar to relief. Id.[2]

A motion for summary judgment presents a question of law reviewed de novo. Osborne v. Mason County, 157 Wn.2d 18, 22, 134 P.3d 197 (2006). We construe the evidence in the light most favorable to the nonmoving party. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). We grant

[2] Documents whose contents are alleged in a complaint but which are not physically attached to the pleading may be considered in ruling on a CR 12(b)(6) motion to dismiss. Rodriguez v. Loudeye Corp., 144 Wn. App. 709, 726, 189 P.3d 168 (2008). We will consider the release and Stremditskyy's policy in evaluating State Farm's motion to dismiss, because Matsyuk incorporated them into the complaint.

summary judgment if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." CR 56(c).

II. Sharing of Legal Expenses

The issue here is whether State Farm is required to contribute pro rata to Matsyuk's legal expenses, incurred in obtaining her liability recovery from Stremditskyy. Matsyuk argues that State Farm offset the PIP coverage against her liability recovery without sharing in her legal expenses, preventing her from being fully compensated. State Farm contends that it was not required to contribute to Matsyuk's legal expenses. State Farm argues that, under the policy, Matsyuk's liability recovery did not create a common fund to reimburse State Farm for its previous payment.

Generally, the American rule requires civil litigants to pay their own legal expenses unless so provided by contract, statute, or a recognized equitable ground. Dayton v. Farmers Ins. Group, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). A recognized exception to this rule allows fee sharing in cases where litigants preserve or create a common fund for the benefit of others as well as themselves. Covell v. City of Seattle, 127 Wn.2d 874, 891, 905 P.2d 324 (1995).

An insurer may have a subrogation right in law, equity, or contract to the extent of payments to its insured. Mahler v. Szucs, 135 Wn.2d 398, 412–13, 957 P.2d 632 (1998).[3] The insurer may seek reimbursement from the recovery

[3] The purpose of subrogation is to put the financial consequences on the party responsible for the loss. Mahler, 135 Wn.2d at 411. There are two features to subrogation: right to reimbursement

its insured obtains from the party at fault, subject to limitations:

> The general rule is that, while an insurer is entitled to be reimbursed to the extent that its insured recovers payment for the same loss from a tort--feasor responsible for the damage, it can recover only the excess which the insured has received from the wrongdoer, remaining after the insured is fully compensated for his loss.
>
> This rule embodies a policy deemed socially desirable in this state, in that it fosters the adequate indemnification of innocent automobile accident victims.

Thiringer v. Am. Motors Ins. Co., 91 Wn.2d 215, 219–20, 588 P.2d 191 (1978) (citations omitted). To the extent the insured's recovery from the tortfeasor is in excess of the funds needed to make the insured whole, the fund is available to reimburse the insurer. Id. at 219. This reimbursement is a benefit to the insurer and makes the insured's recovery a common fund. Mahler, 135 Wn.2d at 426–27. The insurer being reimbursed from that fund must pay a pro rata portion of the fees incurred in obtaining it. Id. The purpose of this rule is to ensure equity: "'It is grossly inequitable to expect an insured, or other claimant, in the process of protecting his own interest, to protect those of the [insurer] as well and still pay counsel for his labors out of his own pocket, or out of the proceeds of the remaining funds.'" Mahler, 135 Wn.2d at 425 n.17 (alteration in original) (quoting 8A John A. Appleman & Jean Appleman, Insurance Law & Practice § 4903.85, at 335 (1981)).

Mahler is the first in a line of automobile insurance cases clarifying the

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and the mechanism for enforcement of that right. Id. at 412. The insurer's right to reimbursement can be effectuated through a lien against any recovery the insured has obtained from a third party or by suing the at-fault party directly. Id. at 412–13.

fee sharing rule. Mahler applied the common fund doctrine when the insured recovered from a fully insured tortfeasor and reimbursed PIP payments received from her insurance carrier. Id. at 436. Winters v. State Farm Mutual Automobile Insurance Co. employed the common fund doctrine when the insured recovered funds from an underinsured tortfeasor and her own underinsured motorist (UIM)[4] coverage and reimbursed PIP payments from her own insurance carrier. 144 Wn.2d 869, 880, 31 P.3d 1164 (2002). Finally, Hamm v. State Farm Mutual Automobile Insurance Co. applied the common fund doctrine where the tortfeasor was uninsured and paid nothing. 151 Wn.2d 303, 318–19, 88 P.3d 395 (2004). Hamm qualified as an insured and recovered both PIP and UIM payments under the same policy. Id. at 306–07. When the insurer offset amounts owed under the UIM coverage for amounts paid under the PIP coverage, it received a benefit, a reimbursement of the PIP payments. Id. at 312–13.

The only case to address whether the common fund doctrine requires the sharing of legal expenses where both PIP and liability payments are made by the tortfeasor's insurer held that it was not.[5] Young v. Teti, 104 Wn. App. 721,

[4] UIM insurance covers the costs incurred in an accident where the defendant is at fault and is either not insured or whose liability policies are insufficient to cover the damage. RCW 48.22.030(1); Hamm, 151 Wn.2d at 308.

[5] Young was decided before Winters and Hamm and not expressly overruled by either. In Young, at-fault driver Teti injured passenger Young. 104 Wn. App. at 722. Teti's insurer, Allstate Indemnity Company, paid Young's medical expenses under a PIP provision, and then paid Young's jury verdict against Teti under the liability coverage. Id. at 723. The court held that Mahler fee sharing was not required for two reasons. Id. at 726–27. First, because Young was not Allstate's insured but rather a third party beneficiary, she did not create a common fund. Id. at 725–27. Her recovery did not benefit anyone other than herself. Id. No third party reimbursed Allstate. Id. at 726. Second, Allstate did not benefit from Young's lawsuit, therefore Young did not create a common fund. Id. at 727.

726–27, 16 P.3d 1275 (2001). Matsyuk contends that the result in that case cannot be reconciled with the subsequent decision in Hamm. We disagree.

Hamm was injured and was paid PIP benefits under the policy covering her. Hamm, 151 Wn.2d at 306. The tortfeasor was uninsured, so Hamm was also entitled to recover under the UIM coverage of the same policy. Id. The insurer stood in the shoes of the tortfeasor. Id. at 308–09. The combination of funds recovered was in excess of the amount needed to make Hamm whole. Id. at 320–21. The insurer offset[6] the amount it had paid under PIP coverage against the amounts due under the UIM coverage, as provided in a nonduplication of benefits clause. Id. at 311–12 & n.4. The offset benefitted the insurer in its capacity as the PIP carrier by allowing it to be reimbursed without making a post recovery claim against its insured. Id. at 313. The court held, "An insurance company may not, however, style this offset as a reduction of any amount owed under UIM coverage, rather than a PIP reimbursement, in order to avoid paying a pro rata share of the insured's legal expenses." Id. at 321.

Here, the nonduplication of benefits clause[7] was not a means of achieving reimbursement while avoiding fee sharing, as in Hamm. Matsyuk was a third party beneficiary of the insurance contract, not a party to the contract. State

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[6] "Offset" refers to a credit to which an insurer is entitled for payments made under one coverage against claims made under another coverage within the same policy. Winters, 144 Wn.2d at 876. "Setoff" refers to sums paid to the insured by another party. Id.

[7] The nonduplication clause contained in the insurance policy provides,

> We will not pay any damages or expenses under Liability Coverage;
> 1. that have already been paid as benefits under Personal Injury Protection Coverage of any policy issued . . . to [Stremditskyy] . . . .

(Emphasis omitted.)

Farm had no contractual right of reimbursement from Matsyuk's recovery fund for the PIP payments it made. Nor did State Farm have a right of subrogation to exercise. State Farm paid Matsyuk. Any subrogation right would have been against the tortfeasor, Stremditskyy, its own insured. But, an insurer has no right of subrogation against its own insured. Sherry v. Fin. Indem. Co., 160 Wn.2d 611, 618, 160 P.3d 31 (2007). There was no right of reimbursement to effectuate and no subrogation litigation cost to avoid.

None of the equitable considerations behind the fee sharing rule are present. In order to create an equitable need to share fees, the common fund must be created entirely by the efforts of the PIP insured. Winters, 144 Wn.2d at 881. Here the PIP coverage was provided under the tortfeasor's policy and is deemed a fund created by the tortfeasor. Maziarski v. Bair, 83 Wn. App. 835, 841 n.8, 924 P.2d 409 (1996). Because that portion of the fund is not attributable to the efforts of Matsyuk, it would be inequitable to award her fees for its recovery. Also, the court in Hamm expressed concern that the insured not be worse off because she purchased two coverages, PIP and UIM, from the same insurer. 151 Wn.2d at 315.

Here, the insured did not purchase any of the coverages. In addition, Matsyuk received full compensation for her injuries. A tortfeasor is generally not responsible to pay the injured party's attorney fees as part of tort compensation. Dayton, 124 Wn.2d at 280; Norris v. Church & Co. Inc., 115 Wn. App. 511, 517, 63 P.3d 153 (2002). Matsyuk did not receive any lesser recovery by virtue of the

offset of coverages than the tortfeasor was obligated to pay. Norris, 115 Wn. App. at 517. Therefore, the offset under the nonduplication of benefits clause in the tortfeasor's policy is not bound by the equitable considerations in Hamm. It did not, as a matter of law, trigger common fund fee sharing considerations.

Had Matsyuk and Hamm gone to trial, the parties would have obtained the same respective results. At trial, what the plaintiff would recover and what the defendant must pay in a judgment is determined by the collateral source rule.[8] Generally, the collateral source rule would prevent the introduction of evidence at trial of payments made by an insurance company. Lange v. Raef, 34 Wn. App. 701, 704, 664 P.2d 1274 (1983). But, where the source of the collateral payments is the at-fault party or a fund created by him to make such payments, the collateral source rule is inapplicable. Id. Such payments may be proven by the tortfeasor at trial to prevent double recovery by the injured party. Id. PIP payments made by the tortfeasor's insurance company are a fund created by the tortfeasor. See id.; Maziarski, 83 Wn. App. at 841 n.8 ("[The collateral source rule] does not apply here because, as noted in the text, the payments in issue here come from [the tortfeasor's] PIP coverage, and such coverage is a fund created by her."). Had this case gone to trial, Stremditskyy would have been entitled to introduce evidence of the PIP payments to Matsyuk

[8] The collateral source rule is the "'well settled rule in tort actions that a party has a cause of action notwithstanding the payment of his loss by an insurance company.'" Mahler, 135 Wn.2d at 412 n.4 (quoting Consol. Freightways v. Moore, 38 Wn.2d 427, 430, 229 P.2d 882 (1951)). A collateral source is a source independent of one of the tortfeasors. Mazon v. Krafchick, 126 Wn. App. 207, 220, 108 P.3d 139 (2005), rev'd on other grounds, 158 Wn.2d 440, 144 P.3d 1168 (2006).

made by his insurer, State Farm, and to have any liability judgment reduced by the amount of those payments. Lange, 34 Wn. App. at 704. The ultimate liability payment recovered at trial would have been the same, and Matsyuk would have had no right to recover any attorney fees. Norris, 115 Wn. App. at 517.

But, had Hamm gone to trial, the PIP payments in Hamm would have been attributable to Hamm's insurer. Maziarski, 83 Wn. App. at 841 n.8. In contrast, the UIM payments would have been treated "as if made by the tortfeasor." Winters, 144 Wn.2d at 880. Therefore, the PIP payments would have been treated as a collateral source and would not have been admitted to reduce the UIM liability at trial. Hamm, 151 Wn.2d at 319. The ultimate judgment would have triggered the insurer's right of reimbursement, and therefore its duty to share in the fees under Mahler. Winters, 144 Wn.2d at 881.

The resulting obligation to share in the plaintiff's attorney fees should be the same whether the recovery is obtained via settlement or trial. The application of Hamm sought by Matsyuk would yield inconsistent results and could deter settlement. Where PIP coverage and liability coverage both are attributable to the tortfeasor, we hold that no common fund exists and no equitable reason exists to impose fee sharing.

As a matter of law, Matsyuk was not entitled to a contribution of fees from State Farm. The trial court did not err in granting State Farm's CR 12(b)(6) motion to dismiss and in denying Matsyuk's motion for partial summary judgment

on this claim.

III. Breach of Contract

Matsyuk next contends the trial court improperly dismissed Matsyuk's breach of contract claim based on the policy language under CR 12(b)(6). Interpretation of an insurance contract is a question of law reviewed de novo. Woo v. Fireman's Fund Ins. Co., 161 Wn.2d 43, 52, 164 P.3d 454 (2007). Because they are generally contracts of adhesion, courts look at insurance contracts in a light most favorable to the insured. Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co., 144 Wn.2d 130, 141, 26 P.3d 910 (2001). A court must give the language of an insurance policy the same construction that an average person purchasing insurance would give the contract. Id. at 137–38.

Matsyuk argues that a proper interpretation of the State Farm policy language requires State Farm to pay a share of Matsyuk's legal expenses. The relevant policy provision read, "Our right to recover our payments applies only after the insured has been fully compensated for the bodily injury, property damage, or loss." (Boldface omitted.) Matsyuk's theory is that State Farm benefited by paying less under liability coverage because of her PIP recovery. Matsyuk argues that a reasonable consumer of insurance could infer that the insured would not be required to bear all the legal expense from a recovery that benefits both parties. But, State Farm has not sought recovery under this provision of the policy. The nonduplication of benefits clause precluded Matsyuk

from recovering the PIP damages a second time under liability coverage. Without the double recovery she could be made whole, but would not have any excess recovery from which State Farm could seek reimbursement. Therefore, there could be no benefit, no common fund, and no fee sharing. Matsyuk has failed to provide a basis for the claim.

Because there is no set of facts here that could justify recovery, the trial court properly dismissed Matsyuk's breach of contract claim.

IV. Bad Faith, CPA, and Conversion Claims

Matsyuk argues her claims for bad faith, CPA violation, and conversion are viable independent claims that should have survived dismissal. For purposes of deciding the defendant's CR 12(b)(6) motion, all of Matsyuk's factual allegations in the complaint will be accepted as true. Dennis v. Heggen, 35 Wn. App. 432, 434, 667 P.2d 131 (1983).

Matsyuk alleged that State Farm violated the CPA by refusing the share legal expenses when recovering PIP payments. Matsyuk also alleged conversion on State Farm's refusal to contribute fees. These allegations do not state a claim separate from the legal argument about fee sharing rejected above. Because Matsyuk was not entitled to fee sharing, no set of facts consistent with the complaint would justify recovery under these claims.

Matsyuk alleged that State Farm violated the CPA, as well as its duty to act in good faith, by improperly refusing to effectuate the settlement on behalf of Stremditskyy unless Matsyuk gave up her independent claims against State

Farm as a PIP insured. An insurer has a duty to act in good faith, including a duty to deal fairly with its insured.[9] Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 387, 715 P.2d 1133 (1986). Whether an insurer has acted in bad faith is a question of fact. Smith v. Safeco Ins. Co., 150 Wn.2d 478, 484, 78 P.3d 1274 (2003). But, the question of whether the complaint alleges sufficient facts to state a claim for bad faith may be reviewed as a question of law. No New Gas Tax, 160 Wn.2d at 164. To prevail, Matsyuk must have shown that State Farm's alleged misconduct was unreasonable, frivolous, or untenable. Liberty Mut. Ins. Co. v. Tripp, 144 Wn.2d 1, 23, 25 P.3d 997 (2001).

The facts as alleged and as assumed to be true are the following: State Farm and Matsyuk came to an agreement on the amount of settlement for Matsyuk's liability claim against Stremditskyy. The parties agreed that State Farm would reduce its ultimate payment by the amount already paid under the PIP coverage, but State Farm declined to pay additional funds to cover a pro rata share of Matsyuk's legal expenses. When Matsyuk disagreed and demanded payment for legal expenses, State Farm refused to complete the settlement unless the plaintiff released her claims as a PIP insured against State Farm. Ultimately, the parties agreed to preserve any claims Matsyuk had against State Farm as a PIP insured and completed the settlement.[10]

[9] "The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance." RCW 48.01.030.

[10] The release stated, "*Provided, however,* that nothing in this Release shall preclude the undersigned from pursuing claims, if any, that she purports to have as an insured under the Personal Injury Protection coverage provided by [Stremditskyy's] . . . policy."

As a matter of law, these facts do not establish a claim for bad faith. In light of the decision in Young, State Farm had no obligation to pay Matsyuk's fees. 104 Wn. App. at 727. State Farm refused to do what it had no obligation at law to do. It was not unreasonable, frivolous, or untenable to do so. Tripp, 144 Wn.2d at 23. The complaint failed to state a claim for bad faith. Accordingly, the complaint also failed to state a claim for a CPA violation. Dismissal was proper.

The trial court did not err in dismissing Matsyuk's claims for bad faith, CPA violation, and conversion which originate from the fee-sharing issue under CR 12(b)(6).

V. Amendment of the Complaint

Matsyuk argues that the trial court should have granted her request to amend her complaint for any deficiencies. She did not specify how she would amend her complaint at either the trial court level or in her briefs to this court. State Farm argues that such an amendment would be futile.

CR 15 provides that leave to amend, "[S]hall be freely given when justice so requires." The decision to grant leave to amend the pleadings is within the discretion of the trial court. Wilson v. Horsley, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). Therefore, when reviewing the trial court's decision to grant or deny leave to amend, courts apply a manifest abuse of discretion test. Id. The trial court's decision will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable or exercised on

untenable grounds or for untenable reasons. Id. The touchstone for the denial of a motion to amend is the prejudice such an amendment would cause to the nonmoving party. Id. Factors which may be considered in determining whether permitting amendment would cause prejudice include undue delay, unfair surprise, and jury confusion. Id. at 505–506. Denying a motion for leave to amend is not an abuse of discretion if the proposed amendment is futile. Rodriguez, 144 Wn. App. at 729.

Matsyuk is attempting to avoid dismissal by requesting leave to amend, because as stated there is no legal basis for her claim to stand. Matsyuk has not identified a legal theory suggesting a possible cure. Without a new legal theory, amendment in this circumstance is futile. The trial court did not abuse its discretion in denying the amendment.

We affirm.

Appelwick, J.

WE CONCUR:

Leach, J.

Cox, J.

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
# DIVISION ONE

| | | |
|---|---|---|
| OLGA MATSYUK, individually, and on behalf of all those similarly situated,<br><br>Appellant,<br><br>v.<br><br>STATE FARM FIRE & CASUALTY CO.,<br><br>Respondent. | ) | No. 64151-4-I<br><br>ORDER DENYING MOTION FOR RECONSIDERATION |

The appellant, Olga Matsyuk, having filed her motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied;

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 5th day of May, 2010.

Appelwick, J.
Judge